THE HONORABLE JOHN E. BRIDGES
Noted for Hearing
Friday, February 4, 2005, 9:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

Petitioners,

v.

King County et al.,

Respondents,

and

Washington State Democratic Central Committee,

Intervenor-Respondent.

NO. 05-2-00027-3

REPLY IN SUPPORT OF WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION TO DISMISS FOR IMPROPER VENUE OR, IN THE ALTERNATIVE, TO TRANSFER VENUE

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CONTENTS

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TABLE OF AUTHORITIES

Cases

Statutes

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Rules

Constitutional Provisions

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I. SUMMARY OF ARGUMENT

Election contests, by the plain terms of the very statute invoked by Petitioners, must be filed in "the appropriate court." This case, involving constitutional issues of first impression likely to be ultimately determined by the Supreme Court, and naming *every one* of the State's counties, their chief election officials, and numerous statewide officials, was not properly filed in this Court and should be transferred to the Supreme Court. There are no allegations involving Chelan County or its auditor that can withstand even the most cursory review – a point that Petitioners concede by the deafening silence on the point in their opposition.

Moreover, a transfer to the one court that can conclusively and definitively resolve these questions will almost certainly *expedite* the ultimate resolution of this case. Indeed, such a transfer serves the public interest in expediting the ultimate resolution of the case, conserving judicial resources, *and* avoiding costly and burdensome discovery on the cash-strapped counties of this State, much of which will likely be rendered pointless and irrelevant once the legal standards are definitively settled by the Supreme Court. Indeed, had Petitioners filed in the Supreme Court to begin with, this contest (and the others currently pending there) could have been concluded, or substantially narrowed, by now. Continued delay, as well as the campaign of distorted, unfair, and unsupported allegations of official misconduct being waged by Petitioners and their supporters, creates a high risk of potent and serious damage to public confidence in our political and electoral system.

Rather than confront the statutory terms requiring election contests to be filed in "the appropriate court" or the compelling public interest that would be served by transfer to the Supreme Court, Petitioners instead accuse Intervenor-Respondent WSDCC ("WSDCC") of

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trying to "delay" or "frustrate" the resolution of this "historic" election contest. Opposition to WSDCC's Motion to Dismiss for Improper Venue ("Opposition") at 1, 6, 10. This litigation, however, is not a political campaign, and challenging the motives of one's opponent is a thin substitute for legal reasoning. Neither WSDCC, nor the many counties that have challenged venue, seek to *delay* the resolution of the contest; far from it, they seek immediate disposition of this case without further ado on several grounds. But in the event that any portion of this case survives, WSDCC respectfully submits that it should be transferred to the Supreme Court or, alternatively, to Thurston County.[1]

II. ARGUMENT AND AUTHORITY

A. Election Contests Are "Sui Generis" and RCW 29A.68 *et seq.*, Not the Generally Applicable Venue Statutes, Governs Venue in Election Contests.

Election contests are "sui generis," as even Petitioners concede. Petitioners' Combined Memorandum in Opposition to County/Auditor Motions to Dismiss at 2. Election contests rest upon and are wholly defined by the statutory authority provided by the Legislature – a point that our Supreme Court has repeatedly emphasized in cases spanning

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[1] WSDCC properly challenged venue at the outset of this contest, before any proceedings of substance occurred. *See* CR 12(b)(3). Thus, Petitioners and the Secretary of State are incorrect when they argue that this contest should remain in Chelan County because it "is already well underway," Opposition at 1, and therefore "judicial economy" would be served by keeping it here, Secretary of State's Response to WSDCC's Motion to Dismiss for Improper Venue or, in the Alternative, to Transfer Venue ("Response") at 2. Indeed, the suggestion that a properly made venue challenge should be rejected on the grounds that the case has been pending for all of *three weeks* with nothing more than procedural rulings to date, is more than a little startling. Economy – not only conservation of *judicial* resources, but also conservation of precious and overburdened *county* resources – is served by transfer to the Supreme Court for definitive rulings, not further costly discovery and delayed resolution of those issues. To the extent that *any* portion of the contest survives such review (a doubtful proposition, to say the least), it is likely to be a shadow of the current sweeping election contest, far more susceptible to rapid resolution.

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nearly a century. *See, e.g.*, *Becker v. County of Pierce*, 126 Wn.2d 11, 18 (1995) ("Early this century we clearly established that the right to contest an election 'rests solely upon, and is limited by, the provisions of the statute relative thereto.'") (quoting *Quigley v. Phelps*, 74 Wash. 73, 75 (1913)); *Malinowski v. Tilley*, 147 Wash. 405, 407 (1928) ("[T]he right to hear and determine an election contest is not ordinarily a judicial function of the courts, and can be exercised by them only when and to the extent which the right is conferred by statute."); *State ex rel. Mills v. Beeler*, 149 Wash. 473, 475 (1928) (rejecting late-filed affidavit in support of election contest and stating that "[t]he court has no inherent jurisdiction to hear election contests, and such a proceeding is not according to the course of the common law. The right of the court to hear and determine such a matter if it exists must be found in the statute. Beyond the power given by the statute the court has no jurisdiction in election contests") (citing *Whitten v. Silverman*, 105 Wash. 238 (1919); *State ex rel. Ransom v. McPherson*, 128 Wash. 265 (1924); *Malinowski*, 147 Wash. 405). While Petitioners rely on the sui generis nature of election contests when it assists them, they ignore the implications of that rule for the venue of this action.

To begin with, the Legislature chose to specify – repeatedly – that election contests must proceed in "the appropriate court."[2] This phrase must be given meaning. Courts

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[2] RCW 29A.68.011 begins by providing that a justice of the Supreme Court, a judge of the Court of Appeals, or a judge of the superior court of the "proper" county may order relief against an official in an election action. It then provides, in its last paragraph, that the affidavit of the elector that initiates the action must be filed "with the appropriate court." In two other instances, the statutes that prescribe the procedure for election contests refer to "the appropriate court." RCW 29A.68.030 dictates the time for filing and the required contents of the affidavit of the elector that begins the contest, and it states that the affidavit "must be filed with the appropriate court." RCW 29A.68.040 sets forth the procedures the court and court clerk follow after an elector has initiated a contest, and it states that "[u]pon such affidavit being filed, the clerk shall inform the judge of the appropriate court."

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should construe statutes to give effect to each word. *See Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 202-03 (2004) ("[S]tatutes must be interpreted and construed so that *all* the language used is given effect, with no portion rendered meaningless or superfluous.") (internal quotation marks omitted). If the Legislature merely wanted the generally applicable venue statutes to govern election contests, it would have had no need to state, repeatedly, that election contests should proceed in "the appropriate court." Read as a whole, RCW 29A.68 *et seq.* vests concurrent *jurisdiction* to hear some election contests in all three levels of courts,[3] but through the word "appropriate," provides that in each instance the proper *venue* of a contest is more limited. *See generally Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 316 (2003) (explaining that jurisdiction refers to a court's power to hear a case whereas venue refers to the proper location for the case to be heard).[4]

B. Under RCW 29A.68 *et seq.*, the Washington Supreme Court Is "the Appropriate Court" to Hear This Contest.

The election statutes do not themselves define what makes a court "the appropriate court" for a given action. The Court, therefore, has the duty to decide if Chelan County Superior Court is "the appropriate court" for this contest in light of the statutes' subject matter, context, and purpose. *See Pub. Util. Dist. No. 1 v. Wash. Pub. Power Supply Sys.*,

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[3] As set forth in WSDCC's separate motion, no court has jurisdiction to hear a contest of a *statewide office* because of Article III, § 4 of the Washington Constitution. But if this Court determines that such election contests may be "decided by" the Judiciary and that the Judiciary has jurisdiction, then there is only *one* "appropriate court" for such an action and, in the context of the specific allegations raised in this election contest, that is either the Supreme Court or Thurston County Superior Court.

[4] This motion concerns venue, not jurisdiction. Thus, on this motion WSDCC does not argue that this Court lacks the power to act, as Petitioners and the Secretary of State mistakenly suggest. Opposition at 5, 6; Response at 2. The issue here is whether venue is proper in this Court and, even if so, whether another court would be a better forum.

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104 Wn.2d 353, 369 (1985) ("In determining the meaning of words used but not defined in a statute, a court must give careful consideration to the subject matter involved, the context in which the words are used, and the purpose of the statute.") (internal quotation marks and citation omitted). Considered in this light, the factors WSDCC has identified in this motion establish that the Washington Supreme Court, not this Court, is the only court that can be considered "the appropriate court" for this contest.[5]

1. This Contest Challenges a Statewide Official and Names as Respondents Every County and Chief County Election Official in the State, Among Others.

Petitioners do not disagree that this contest concerns a statewide executive office or that they filed suit against a statewide executive official and each county of the State and each county's chief election official. Petitioners contend that these factors are irrelevant to the issue of venue, primarily because neither the election contest statutes nor case law specifically states that superior courts cannot hear such contests. Opposition at 3, 4. As noted in WSDCC's motion, the lack of specific statutory guidance or case law on this point is not surprising, given that the Washington Constitution requires election contests of statewide executive officers to be brought in the Legislature and that no prior case in

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[5] Assuming that any court has jurisdiction to hear this matter, the Supreme Court undisputedly would have original jurisdiction to do so and venue would also be proper in the Supreme Court. Thus, Petitioners' concern that if this motion is granted, "venue would not be available anywhere with respect to the entire case and all defendants," Opposition at 3; *see also* Response at 2, is simply wrong. Venue in the Supreme Court or Thurston County is more appropriate not only on account of the specific allegations, but also because the Petition involves a claim against the State's chief election officer, which even the Secretary of State concedes must "ordinarily" be filed in Thurston County "where his office is located and where official acts are performed." Response at 2. If this action challenges the issuance of the certificate of election (as Petitioners insist in response to the counties' motions to dismiss) and the statute of limitations must be measured from the date of the issuance of the certificate of election, then *those* Thurston County transactions must *also* be the measure of the appropriate venue.

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Washington history has presented this precise issue.[6] WSDCC's Motion to Dismiss for Improper Venue or, in the Alternative, to Transfer Venue ("Motion") at 5 n.2. The statewide aspects of this contest, however, especially when considered in light of the other factors WSDCC identifies, establish that only the Supreme Court is "the appropriate court" for this contest.

2. This Contest Has No Viable Connection to Chelan County.

Petitioners assert that venue is proper in Chelan County because "Chelan County and some of its officials are among the defendants." Opposition at 1. Aside from this passing wave of the hand, Petitioners do not even attempt to seriously prosecute any claim against Chelan County or its auditor, much less respond to the specific and fatal flaws in the only claims asserted that were noted in WSDCC's motion. Their silent concession is telling.

In fact, although Chelan County and its auditor (Evelyn L. Arnold) are nominally involved in this contest as Respondents, Petitioners have identified no viable factual, substantive connection to Chelan County. The only allegation related to Chelan County is that the Chelan County canvassing board did not reconsider, *after* it had certified the manual recount, its decision to reject Thomas E. Canterbury's absentee ballot for signature reasons. *See* Affidavit of Thomas E. Canterbury in Support of Election Contest Petition ("Canterbury Aff."); Affidavit of Fredi Simpson in Support of Election Contest Petition ("Simpson Aff.") (describing attempt to present Mr. Canterbury's affidavit to the canvassing board). This allegation plainly is not grounds for an election contest. *See* RCW 29A.68.020

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[6] *Becker v. County of Pierce*, 126 Wn.2d 11 (1995), concerned the primary election of a statewide officer, but whether venue was proper was not addressed, most likely because the allegations in that case related to only one county and to the actions of the candidate in his capacity as county auditor.

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(enumerating five grounds for an election contest, none of which relate to such an allegation).

Further, the canvassing board's acts do not constitute any type of cognizable error. This *precise* type of claim was considered and emphatically rejected by the Washington Supreme Court in earlier litigation concerning this very election. On November 17, 2004, WSDCC presented the affidavits of 24 voters whose signatures had been previously rejected to the King County canvassing board. *See McDonald v. Sec'y of State*, 103 P.3d 722, 723 (Wash. 2004). When the canvassing board rejected those affidavits because they had been submitted *after* the county's initial certification of the election results, WSDCC challenged that decision (among other things) in an original action filed in the Supreme Court. *See id.* Far from embracing the position it now advances, the Washington State Republican Party – the apparent backer of Petitioners in this action – intervened in that action and *opposed* the reconsideration of those ballots.[7] *See* Supplemental Declaration of William C. Rava in Support of WSDCC's Motions to Dismiss ("Rava Decl.") ¶ 2, Ex. A. The Court unanimously rejected WSDCC's argument that counties should have accepted affidavits from voters attempting to correct signature problems after certification. *See McDonald*, 103 P.3d at 723. The Canterbury affidavit was not even *submitted* to the Chelan County canvassing board until December 23, 2004, Simpson Aff. ¶ 3, long *after* even Chelan County's *final* certification of the Chelan County results, Rava Decl. ¶ 7, Ex. F, and after the decision in *McDonald* on December 14, 2004. As a result, the claim is squarely foreclosed and its assertion here has utterly no foundation and borders on frivolous in light of the clear

[7] Indeed, the Washington State Republican Party indignantly insisted that to consider such affidavits would constitute "chang[ing] the rules" of the election. Rava Decl. ¶ 2, Ex. A at 1, 10.

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and unanimous decision in *McDonald*. It certainly provides precious little support for a claim that venue is proper in this county (and, perhaps for this reason, Petitioners do not even attempt to defend the proposition).

Finally, the sole affidavit upon which the claim is based is, in any event, untimely. Affidavits supporting election contests must be filed within ten days of the "issuance of the certificate of election." RCW 29A.68.011. In this case, the Secretary of State's certification of the election occurred on December 30, 2004. Mr. Canterbury's (legally insufficient) affidavit was not filed until January 18, 2005. It is therefore untimely and cannot be considered. *See Beeler*, 149 Wash. at 475-76 (rejecting as untimely supplemental affidavit filed in support of election contest after deadline defined by statute and noting that "[t]he court had no jurisdiction to hear and determine the new grounds of contest set out in the supplemental affidavit because the provisions of the statute are jurisdictional").[8]

Petitioners' lack of any viable evidence or allegations specific to Chelan County has, of course, profound implications for venue in this action. An election contest does not begin with a notice pleading complaint. An elector initiates an election contest by filing an affidavit that alleges the "particular causes of the contest" with "sufficient certainty." RCW 29A.68.030; *see also* RCW 29A.68.011. As the Court held in *Beeler*, these requirements are specific, demanding, and jurisdictional. And they cannot be remedied by after-the-fact supplemental affidavits seeking to supply what the original affidavit did not.

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[8] For nearly a century, the Washington Supreme Court has consistently enforced the deadlines in election contest and related statutes. *See, e.g., Cothern v. King County Election Canvassing Bd.*, 86 Wn.2d 40, 44 (1975) (dismissing appeal not filed in compliance with time limitations for appeal specified in election statutes); *State ex rel. Mills v. Howell*, 93 Wash. 257, 260 (1916) (rejecting action brought under primary election error-correction statute because untimely filed); *State ex re. Blackman v. Superior Court*, 82 Wash. 134, 136 (1914) (rejecting writ petition because not filed within 10-day period for appeal specified in election statutes).

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See Beeler, 149 Wash. at 475-76. But once Mr. Canterbury's allegations fall from this case as squarely foreclosed by *McDonald*, or as an untimely effort to supplement the original affidavit (thus barred by *Beeler*), there is no remaining connection to Chelan County.[9]

3. Petitioners' Requested Special Election for Governor Should Not Be Ordered by a Single Judge in a Single County.

Petitioners' only discussion of the statewide implications of the extraordinary remedy they seek, a new special election for Governor, is the statement, without citation, that superior courts have the "power to grant whatever relief may appear appropriate." Opposition at 5. Perhaps. (Although, for the reasons stated elsewhere, neither this nor any other Court has the constitutional authority to order the new special election sought by Petitioners). But – for purposes of *this* motion – Petitioners nowhere dispute that the remedy they seek would impact voters and taxpayers across the entire State. This Court should not assume that responsibility in the context of this case.[10]

4. The Washington Supreme Court Could Consolidate the Pending Election Contests.

If this contest were proceeding before the Supreme Court, that Court could consolidate this contest with those already pending before it. The Supreme Court's ability to

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[9] Petitioners suggest that WSDCC brings this motion in order to "move the case to a forum that [WSDCC] apparently perceives as potentially more favorable to it." Opposition at 1. The argument (another in a series of challenges to the motives of WSDCC in an apparent effort to disparage the motives of any party who challenges the jurisdiction or venue of this action), is more than a little ironic, given the rather glaring absence of any viable connection to Chelan County other than Petitioners' own desire to select the forum for what they baldly admit are "political" reasons. *See* Rava Decl. ¶ 3, Ex. B.

[10] *See also* Benton County and Benton County Auditor Bobbie Gagner's Response to Petitioners' Combined Opposition to Motions of Benton County and Benton County Auditors' Motion to Dismiss at 4 (arguing that the Court has no power to order a county to hold a new election).

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consolidate all the contests is another factor indicating that the Supreme Court, rather than this Court, is the "appropriate" court for this contest. All the contests would be parallel election contests over which the Supreme Court has original jurisdiction and therefore it would have the power to consolidate them. *Cf. State v. Goldberg*, 149 Wn.2d 888, 892 (2003) (noting that the Court of Appeals consolidated three personal restraint petitions, over which it had original jurisdiction).

Further, notwithstanding Petitioners' attempts to denigrate the other contests for being filed by *pro se* Petitioners who thus far have not sought discovery, Opposition at 9, legally all the contests stand on the same footing. Indeed, two actions pending in the Supreme Court were filed *before* the contest at hand. The voters who filed the other contests are electors of this State, as are Petitioners (except for the Rossi campaign itself). Petitioners may have the backing of financial interests that can retain large law firms and carpet the state with indiscriminate, expensive, and burdensome discovery, but that hardly is a point *in favor* of this overburdened litigation. Nor does it suggest that expeditious resolution of the dispute is likely when pursued in such a manner.

More important, Petitioners' litigation preferences are entirely irrelevant to the legitimacy of the other pending election contests filed in the Supreme Court and elsewhere. Thus, unless this contest is re-filed upon dismissal or transferred to the Supreme Court, the possibility remains that the different contests will proceed on multiple fronts. As the Secretary of State points out: "The fact that this case involves a single statewide election as to which a single statewide standard must be applied to the facts also supports the conclusion that the matter should not be permitted to proceed piecemeal in multiple counties." Response at 2. Exactly so. And the point is particularly crucial where, as here,

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other actions are already pending in the Supreme Court (a point the Secretary of State fails to address). For precisely this reason, the action should be transferred to the Supreme Court.

5. The Washington Supreme Court Can Provide for Any Fact Finding That It Finds Necessary.

That the Supreme Court does not sit as a trial court is no bar to it exercising its original jurisdiction over this matter. Indeed, the same objection could be raised as to every case falling within the Court's original jurisdiction. It is particularly *in*applicable here.

First, no fact finding is likely to be necessary. From the Petition and supporting affidavits it appears that this contest should be disposed of on purely legal, rather than factual, grounds.[11] It is proper and appropriate for the Supreme Court to exercise original jurisdiction to resolve legal questions of broad public significance, and through the exercise of original jurisdiction it can do so in a more expedient fashion than would occur through the normal appellate process. *Cf. City of Tacoma v. O'Brien*, 85 Wn.2d 266, 268 (1975) (mandamus action). Transferring this action to the Supreme Court is likely to *accelerate* final resolution of this matter, not delay it.

Moreover, if fact finding is necessary, it would be far more expeditious and efficient to conduct that fact finding *after* the standards are definitively resolved by the Supreme Court, rather than to burden the counties (and through them, the taxpayers of this State) with broad ranging and burdensome discovery on issues that are likely to be held entirely irrelevant. And, through a special master or referral to a superior court the Supreme Court

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[11] Petitioners do not intend to prove that the errors they allege actually changed the outcome of the election and they do not intend to provide a supportable legal basis for granting the relief they seek. Moreover, virtually all of their alleged errors relate to the issuance of ballots to improperly registered voters. These allegation do not, as a matter of law, suffice because Petitioners failed to timely challenge the voters' registrations as required by RCW 29A.68.020(5)(b).

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could easily resolve whatever narrow factual questions are left after the legal questions in this contest are resolved. *See, e.g.*, RAP 16.2(d). This Court itself has indicated that a special master could be of benefit in this matter. *See* Mins. of Jan. 20, 2005 hearing at 6. The Supreme Court's final and definitive resolution of the threshold legal issues at this stage, plus any fact-finding that remains, will not take longer than completing the entire contest in this Court, having a record for appeal prepared, briefing and arguing the appeal, and having the Court issue a decision on appeal. In fact, it seems more likely that proceeding in the Supreme Court in the first instance will be the fastest way to obtain a resolution of these issues for the people of this State.

C. Even if This Court Is *an* "Appropriate" Court for This Contest, the Court Should Transfer This Contest to the Washington Supreme Court.

For all the reasons stated above, this Court is not "the appropriate court" for this contest, and the Washington Supreme Court is. Accordingly, the Court should either dismiss this contest for improper venue or transfer it to the Supreme Court. But even if this Court determines that the election contest statute contemplates multiple "appropriate" courts for venue and that this Court is *an* appropriate court, the same factors establish that the Court should transfer this contest to the Supreme Court under RCW 4.12.030 to serve the ends of justice. *See Clampitt v. Thurston County*, 98 Wn.2d 638, 647 (1983) (stating that "[c]oncerns for judicial economy and inter court comity come within this criterion").

Petitioners suggest that this Court lacks the ability to transfer this contest to the Supreme Court. Opposition at 8. Ordinarily a superior court could not transfer an action to the Supreme Court, because the Supreme Court does not sit as a trial court. But actions brought pursuant to RCW 29A.68.011 (whether subsections (1)-(5) or the contest subsection (6)) can be initiated in the Supreme Court, as recently confirmed by *McDonald v.*

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Secretary of State. RCW 4.12.030, the venue transfer statute, accordingly gives the Court authority to transfer this action to the Supreme Court. That this statute refers to "chang[ing] the place *of trial*" is no bar, since the Supreme Court has explained that the statute applies to entire proceedings of many varieties. *See Clampitt*, 98 Wn.2d at 647 n.6 (stating that the phrase "place of trial" in RCW 4.12.030 "must mean place of 'action or proceeding'" and citing different types of proceedings that have been transferred under the authority of this statute). Accordingly, a transfer to the Supreme Court would no more constitute an impermissible attempt by this Court to "manage" or "set" the Supreme Court's docket, Opposition at 8, than would any other routine venue transfer granted by superior courts every day (or the filing of an original action, for that matter).

D. In the Alternative, This Court Should Transfer This Contest to Thurston County Superior Court.

Venue transfers under RCW 4.12.030 occur both for the convenience of the witnesses and to serve the ends of justice, which includes factors such as inter-court comity and efficiency. *See Clampitt*, 98 Wn.2d at 647. Transfer to Thurston County would advance both concerns.

First, with respect to convenience, Petitioners' claim that Chelan County is the most convenient venue for this contest is disingenuous at best. Chelan County offers a number of attractive features. But convenience for parties and witnesses traveling from across the state is not one of them. This contest has no particular factual connection to Chelan County other than the fact that voters here – as in every other county of the State – voted in the election at issue. Chelan County may be located "near the geographic center of the state," Opposition at 7, but it is definitely not located in the transportation center of the State. The convenience of getting from one point in the State to another depends on the transportation routes and

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infrastructure, not the geographic distance. The sheer number of parties appearing by telephone in recent hearings demonstrates the difficulty and expense of travel to Chelan County. This difficulty will only be amplified if the case goes forward to trial and dozens of witnesses are called.[12] For most of the individuals involved in this contest, traveling from their homes to Olympia is easier, safer during winter weather, and takes much less time than does traveling to Wenatchee. It is true that this contest involves all the counties and their chief election officials, but Petitioners' early stipulated dismissal of various smaller and eastern counties, coupled with their statement in open court that they would not even consider such arrangements for King, Pierce, and Snohomish counties, demonstrates that their plain focus of attention is not on Stevens or Douglas or even Spokane counties, but on King, Pierce, and Snohomish counties. The only depositions noted to date by any parties in this litigation have involved witnesses from King, Pierce, and Snohomish counties. Petitioners have declared in open court their intention to apply particular scrutiny to those counties. For the witnesses in these counties (who may well form the vast majority of trial witnesses), it is undeniable that Olympia is more convenient than Wenatchee.

In addition to these factors of convenience, the other factors identified by WSDCC – that Olympia is the seat of our State's government; that Olympia is where the Secretary, the State's chief election officer, resides; that Olympia is where the Secretary certified the election; that Olympia is where the Legislature received that certificate and declared Governor Gregoire to be elected – all establish that it would serve the ends of justice for this

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[12] To meet their burden of proof to set aside the election, Petitioners cannot offer evidence of any illegal vote unless they have provided a list of those illegal votes "and by whom given." RCW 29A.68.100. "No testimony may be received as to any illegal votes, except as to such as are specified in the list." *Id.* Barring stipulation, each of those voters will be called to testify and each will spur possible responsive witnesses.

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contest to be heard in Olympia. For example, *ATU Legislative Council v. State*, 145 Wn.2d 544 (2002), cited by Petitioners as an example of a case brought against the auditors of each county of the State, Opposition at 3 n.2, was brought in Thurston County.

Petitioners assert that the Secretary has taken the position that Chelan County is "the" appropriate forum for this case. Opposition at 7. Although the Secretary does not object to venue in this Court, it is not accurate to say that he has taken the position that the contest cannot be heard elsewhere. The Secretary explicitly states that venues other than this Court "would be appropriate." Response at 2. He also agrees with WSDCC that venue would be proper and appropriate in Thurston County and, in fact, insists that "ordinarily" such claims *should* be filed there. *Id.* ("Ordinarily . . . an action against Secretary Reed should be filed in Thurston County – where his office is located and where official actions are performed."). And they should for precisely those reasons.

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III. CONCLUSION

For the reasons set forth above, the Court should grant the Motion to Dismiss for Improper Venue or, in the Alternative, to Transfer Venue.

DATED: January 31, 2005.

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